(2)

No. 99-1783

Supreme Court, U.S.
FILED
JUN 15 2000
CLERK

In The

Supreme Court of the United States

TERRANCE J. FREDERICK,

Petitioner,

v.

KIRBY TANKSHIPS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ALLEN VON SPIEGELFELD, ESQUIRE
Counsel of Record

and

CHARLES TYLER CONE, ESQUIRE
FOWLER, WHITE, GILLEN, BOGGS,
VILLAREAL AND BANKER, P.A.
Post Office Box 1438
Tampa, Florida 33601
(813) 228-7411

Counsel for Respondent,
Kirby Tankships, Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

23pp

QUESTIONS PRESENTED

As the body of this brief makes clear, this Court should deny Petitioner Terrance J. Frederick's petition for writ of certiorari as to all questions presented in the petition. In addition, and in accordance with Supreme Court Rule 15.2, Respondent Kirby Tankships, Inc., raises the following objections to the questions presented:

1. The first question presented in the petition does not accurately reflect the Eleventh Circuit's holding on this issue. If this Court grants the petition as to this question, Respondent submits the following as a more accurately phrased question:

> WHETHER THE ELEVENTH CIRCUIT CORRECTLY HELD THAT PETITIONER WAS NOT ENTITLED TO PENALTY WAGES UNDER 46 U.S.C. § 10504 BECAUSE THE VESSEL ON WHICH PETITIONER WAS EMPLOYED WAS ENGAGED IN COASTWISE COMMERCE.

2. Contrary to Supreme Court Rule 14.1(a), Petitioner's second question presented is argumentative and, again, does not accurately reflect the Eleventh Circuit's holding. If this Court grants the petition as to this question, Respondent submits the following as a more accurately phrased question:

> WHETHER THE ELEVENTH CIRCUIT CORRECTLY HELD THAT THE $15 MAXIMUM DAILY MAINTENANCE RATE ESTABLISHED BY THE COLLECTIVE BARGAINING AGREEMENT BETWEEN RESPONDENT AND PETITIONER'S UNION WAS ENFORCEABLE.

QUESTIONS PRESENTED – Continued

3. Petitioner's third question presented is also argumentative. Moreover, based on the arguments presented to the Eleventh Circuit, the third question presented is subsumed within the second question presented.

4. As explained in the body of this brief, Petitioner's fourth question presented was not passed on by the Eleventh Circuit.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent submits the following as a complete list of Respondent's parent corporations and publicly held companies that own 10% or more of Respondent's stock:

1. AFRAM Carriers, Inc.
2. Americas Marine Express, Inc.
3. Dixie Bulk Transport, Inc.
4. Dixie Carriers, Inc. (formerly Dixie Security Corporation)
5. Dixie Offshore Transportation Company
6. Engine Systems, Inc.
7. General Energy Corporation
8. Hollywood Marine, Inc.
9. Hollywood Acquisition Company
10. Kirby Corporation
11. Kirby Engine Systems, Inc.
12. Kirby Exploration Company of Texas
13. Kirby Inland Marine, Inc. (formerly Dixie Carriers, Inc.)
14. Kirby Inland Marine, Inc. of Louisiana (formerly Chotin Carriers, Inc.)
15. Kirby Inland Marine, Inc. of Mississippi (formerly Brent Transportation Corporation)

CORPORATE DISCLOSURE STATEMENT – Continued

16. Kirby Inland Marine, Inc. of Texas (formerly Dixie Marine, Inc.)
17. Kirby Marine Transportation Corporation
18. Kirby Pioneer, Inc.
19. Kirby Tankships, Inc.
20. Kirby Terminals, Inc.
21. Marine Systems, Inc.
22. Mariner Reinsurance Company Limited
23. Oceanic Insurance Limited
24. Rail Systems, Inc.
25. Sabine Transportation Company
26. Western Towing Company

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

CORPORATE DISCLOSURE STATEMENT iii

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 4

A. THE ELEVENTH CIRCUIT CORRECTLY HELD THAT FREDERICK WAS NOT ENTITLED TO PENALTY WAGES UNDER 46 U.S.C. § 10504 BECAUSE THE VESSEL ON WHICH FREDERICK WAS EMPLOYED WAS ENGAGED IN "COASTWISE COMMERCE." 4

B. THE ELEVENTH CIRCUIT CORRECTLY HELD THAT THE CBA'S MAXIMUM DAILY MAINTENANCE RATE OF $15 WAS ENFORCEABLE 7

C. ANY POTENTIAL EXCEPTION FOR SHIPOWNERS WHO VIOLATE THE TERMS OF A COLLECTIVE BARGAINING AGREEMENT HAS NO APPLICATION TO THIS CASE 11

D. THE ELEVENTH CIRCUIT WAS NOT ASKED TO DETERMINE THE PROPER STANDARD FOR AN AWARD OF CONSEQUENTIAL DAMAGES FOR FAILURE TO PAY MAINTENANCE AND CURE 12

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

DECISIONAL AUTHORITY

Al-Zawkari v. American Steamship Co., 871 F.2d 585 (6th Cir. 1989) 8, 10

Baldassaro v. United States, 64 F.3d 206 (5th Cir. 1995), *cert. denied*, 517 U.S. 1207 (1996) 8, 9, 10

Barnes v. Andover Co., 900 F.2d 630 (3d Cir. 1990) 8, 9, 10

Frederick v. Kirby Tankships, Inc., 205 F.3d 1277 (11th Cir. 2000) ..... *passim*

Gardiner v. Sea-Land Service, Inc., 786 F.2d 943 (9th Cir.), *cert. denied*, 479 U.S. 924 (1986) 7, 8, 9, 10

Macedo v. F/V Paul and Michelle, 868 F.3d 519 (1st Cir. 1989) 8, 10

Richardson v. Marsh, 481 U.S. 200 (1987) 13

Solvang v. M/T Plan Kristine, 1993 WL 666703 (S.D. Tex. 1993) 6

Thaxter v. City of New York, 707 F. Supp. 757 (S.D.N.Y. 1989) 5

Weeks v. Angelone, 120 S. Ct. 727 (2000) 13

STATUTORY AUTHORITY

46 U.S.C. § 544 6

46 U.S.C. § 10301 ..... 4, 5

46 U.S.C. § 10501 ..... 5, 6

46 U.S.C. § 10504 ..... 3, 4, 6

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITY

Supreme Court Rule 10 ..... 9, 12

Supreme Court Rule 14.1(a) i

Supreme Court Rule 15.2 i

Supreme Court Rule 29.6 iii

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondent, Kirby Tankships, Inc. ("Kirby"), requests that this Court deny the petition for writ of certiorari seeking review of the opinion entered by the United States Court of Appeals for the Eleventh Circuit in this case on March 8, 2000.

STATEMENT OF THE CASE

Kirby cannot accept the "Statement" submitted by Petitioner, Terrance J. Frederick ("Frederick"), because it contains many facts irrelevant to proper disposition of Frederick's petition and incorporates argument in support of Frederick's position. Kirby submits the following, taken verbatim from the Eleventh Circuit's opinion:

> Kirby owns and operates oil tankers, including the Champion. Kirby hired Frederick, a career ship engineer, to work on the Champion as its chief engineer. Frederick worked on the Champion as it delivered oil from Pascagoula, Mississippi, to various U.S. ports on the Atlantic Ocean.
>
> On September 12, 1994, while aboard the Champion, Frederick slipped and fell on an allegedly oily ramp. As a result, he suffered severe pain in his left knee, hips, and back. He laid on the deck until another crewmember found him and assisted him to his room. The ship's captain, Captain Fox, visited Frederick and entered a notation into the ship's log that Frederick suffered injuries to his "left leg, knee to hip." The

ship arrived in port on September 13, and Frederick went to a medical facility where he received a "not fit for duty" slip. He returned to the ship for the night and left the ship the next day. Subsequently, he traveled to his mother's house and stayed with his fatally-ill mother until she died on October 30, 1994.

While at his mother's house, Frederick sought treatment for his injuries. Dr. Sicari treated Frederick's knee and recommended that he seek further treatment from Dr. Hottentot, an orthopedic surgeon. Dr. Hottentot examined Frederick's knee and concluded that his knee had recovered. Dr. Hottentot, however, discovered that Frederick, for the last 10 to 15 years, had suffered from a degenerative hip condition. As a result, Dr. Hottentot advised Frederick to undergo a bilateral hip replacement and advised Frederick that he should not return to work.

Even though Frederick's hip problems persisted, he returned to work on the Champion in January of 1995 because he needed money. His hips caused him constant pain, but he could not take pain medication onboard the ship because Kirby had a policy against drug use by its employees. Due to the constant pain, Frederick cut short his tour of duty. A few months later, Kirby terminated Frederick, alleging that he falsified oil records. After his termination, Frederick consulted an orthopaedic surgeon, Dr. Choung, who eventually performed right hip replacement surgery on Frederick.

On May 23, 1996, Frederick filed a complaint against Kirby, asserting claims of Jones Act negligence, unseaworthiness, maintenance, and cure for injuries to his left knee, both hips, and

> back that he suffered in the slip and fall. He also sought lost wages and penalty wages pursuant to 46 U.S.C. § 10504. After a series of in limine rulings, the district court conducted a jury trial.
>
> After the conclusion of the trial, the jury returned a verdict in favor of Frederick in the amount of $810,903.80. This award included $525,069.00 for unearned wages, maintenance, and cure, and $1,242,760.00 for Jones Act negligence and unseaworthiness, adjusted downward by 77% due to Frederick's pre-existing hip condition. The district court denied Kirby's renewed motion for judgment as a matter of law, or alternatively, motion for a new trial or remittitur. Kirby then appealed to this court.

Frederick v. Kirby Tankships, Inc., 205 F.3d 1277, 1282 (11th Cir. 2000).

As it relates to Frederick's petition, the Eleventh Circuit's opinion held (1) that Frederick was not entitled to penalty wages under 46 U.S.C. § 10504; and (2) that the maximum daily maintenance rate in Frederick's union's collective bargaining agreement ("CBA") with Kirby governed Frederick's claim for maintenance and cure. *See id.* at 1288-92.

REASONS FOR DENYING THE WRIT

A. THE ELEVENTH CIRCUIT CORRECTLY HELD THAT FREDERICK WAS NOT ENTITLED TO PENALTY WAGES UNDER 46 U.S.C. § 10504 BECAUSE THE VESSEL ON WHICH FREDERICK WAS EMPLOYED WAS ENGAGED IN "COASTWISE COMMERCE."

The Eleventh Circuit held that Frederick was not entitled to penalty wages under 46 U.S.C. § 10504 because *The Champion*, the Kirby vessel on which Frederick served, was engaged in "coastwise commerce." Section 10504 plainly excludes vessels engaged in coastwise commerce from its operation. *See* 46 U.S.C. § 10504(d)(1).

Frederick alleges no current conflict among the circuit courts of appeal as to the meaning of "coastwise commerce." Rather, Frederick's basis for asking this Court to review the Eleventh Circuit's decision on this issue is apparently nothing more than his belief that the Eleventh Circuit incorrectly resolved the issue.

Frederick is wrong; the Eleventh Circuit correctly determined that *The Champion* was, at the time of Frederick's injury, "a vessel engaged in coastwise commerce." *Id.* As the Eleventh Circuit aptly observed, section 10504 appears in chapter 105 of title 46 of the U.S. Code. That chapter, including section 10504, applies to "coastwise" (as opposed to "foreign" or "intercoastal," *see* 46 U.S.C. § 10301) voyages. "Coastwise" is defined as

"between a port in one State and a port in another State (except an adjoining State)." 46 U.S.C. § 10501.[1]

The Eleventh Circuit simply used this explicit definition of "coastwise" to hold that "a vessel engaged in coastwise commerce" is "a vessel engaged in commerce that travels between U.S. port in one State and a U.S. port in another, non-adjacent State. . . ." *Frederick*, 205 F.2d at 1290. Since *The Champion* was transporting heating oil between Mississippi and Connecticut, the Eleventh Circuit correctly held that *The Champion* was "a vessel engaged in coastwise commerce" and therefore not subject to the penalty wage statute. *See id.* at 1289.

Frederick attempts to muddle this plain reading of the statute by arguing that *The Champion* was on a "coasting" voyage and not a "coastwise" voyage. However, as the Eleventh Circuit correctly observed, Frederick's argument amounts to a distinction without a difference. The current version of the statute does not refer to coasting voyages; the statute simply covers all voyages from one port to another (with certain exceptions not relevant here).[2] Thus, Frederick mistakenly argues that the Eleventh Circuit construed "coastwise voyages" to exclude "coasting voyages." To the contrary, the Eleventh Circuit

---

[1] Voyages between a port on the Atlantic coast and a port on the Pacific coasts are "intercoastal voyages" governed by chapter 103. *See* 46 U.S.C. § 10301. Thus, they are excluded from the definition of "coastwise" voyages. *See* 46 U.S.C. § 10501 (excluding voyages governed by chapter 103).

[2] This reading of the statute is fully consistent with *Thaxter v. City of New York*, 707 F. Supp. 757 (S.D.N.Y. 1989). As explained above, no one disputes that *The Champion* was on a port-to-port voyage within the meaning of the statute.

plainly held that *The Champion* came within the "port-to-port" definition of section 10501.

The Eleventh Circuit's holding was based not on its determination that *The Champion* was on a coastwise voyage, but on its determination that *The Champion* was engaged in coastwise (that is, port-to-port) commerce. To the extent that Frederick relies on cases construing the former exception for "coastwise trade," 46 U.S.C. § 544, that reliance is misplaced. Section 10501 now provides a clear definition of "coastwise." As the Eleventh Circuit pointed out, the legislative history of the new section 10504(d)(1) confirms that that definition of coastwise was also intended to apply to the exception for "coastwise commerce":

> Coastwise commerce encompasses voyages of vessels from one place in the United States to another, including voyages on the Great Lakes, but not voyages from the Atlantic Coast to the Pacific Coast. . . .

S. Rep. No. 99-24, at 4, *reprinted in* 1985 U.S.S.C.A.N. 25, 28.[3]

In sum, the Eleventh Circuit correctly concluded that *The Champion* fell within the scope of the current penalty wage statute, but that it also came within the exception for vessels engaged in "coastwise commerce." Frederick

---

[3] Notably, neither the new statute nor the foregoing legislative history limits "coastwise commerce" to sheltered bodies of water or harbors. Thus, *Solvang v. M/T Plan Kristine*, 1993 WL 666703 (S.D. Tex. 1993), the only case which supports Frederick's reading of the current penalty wage statute, is entirely unfounded.

cannot show that this decision was even erroneous, let alone in conflict with current cases from other circuit courts of appeal.

B. THE ELEVENTH CIRCUIT CORRECTLY HELD THAT THE CBA'S MAXIMUM DAILY MAINTENANCE RATE OF $15 WAS ENFORCEABLE.

Frederick phrases his second question presented as, "Are Ill or Injured Sailors Who Are Represented By Unions Entitled to the Protection of the Historic Law of Maintenance?" (Pet., at 17) This issue, however, is not the subject of serious dispute. As the Eleventh Circuit plainly recognized, "No private agreement is competent to abrogate the shipowner's duty to pay maintenance." *Frederick*, 205 F.3d at 1291 (citing *De Zon v. American President Lines*, 318 U.S. 660 (1943)). The real question, therefore, is whether, through collective bargaining, seamen and shipowners can contractually place a dollar value on that duty. There is no actual conflict as to this issue. All of the circuits have agreed that a collective bargaining agreement can place a dollar value on the duty to pay maintenance.

The overwhelming majority of circuit courts that have considered the issue before the Eleventh Circuit decided *Frederick*, have answered this question in the affirmative. In *Gardiner v. Sea-Land Serv., Inc.*, 786 F.2d 943, 948-49 (9th Cir.), *cert. denied*, 479 U.S. 924 (1986), the Ninth Circuit held that, although the *right* to maintenance was a common-law right not preempted by federal labor law, a policy of promoting collective bargaining as the

most effective means of achieving workplace improvements meant that the *rate* of maintenance could be fixed by collective bargaining. The Court reasoned that a relatively low daily maintenance rate could be more than offset by other gains (such as increased wages, benefits, and other amenities), and that the seamen themselves, speaking through their unions, were in the best position to determine the optimal package of benefits. *See id.* Not to enforce contractually bargained-for maintenance rates would therefore undermine the collective bargaining process. *See id.*

Since 1986, three other circuit courts of appeal have more or less adopted the reasoning of *Gardiner* and enforced daily maintenance rates established by CBAs. *See Al-Zawkari v. American Steamship Co.*, 871 F.2d 585 (6th Cir. 1989); *Macedo v. F/V Paul and Michelle*, 868 F.3d 519 (1st Cir. 1989); *Baldassaro v. United States*, 64 F.3d 206 (5th Cir. 1995), *cert. denied*, 517 U.S. 1207 (1996). In the present case, the Eleventh Circuit joined this overwhelming majority. *See Frederick*, 205 F.2d at 1291-92.

The only circuit court to reach a slightly different conclusion is the Third Circuit. *See Barnes v. Andover Co.*, 900 F.2d 630 (3d Cir. 1990). The *Barnes* court held that the $8 daily rate established by most CBAs was ordinarily inadequate for food and lodging in Philadelphia. *See id.* at 640. Thus, the court held, a seaman was not necessarily bound by the CBA rate. *See id.* However, even the *Barnes* court acknowledged that maintenance can be a part of a collective bargaining agreement that should be left undisturbed unless shown to be inadequate.

Frederick suggests that this Court must resolve this conflict. Interestingly, however, this Court has already declined an opportunity to decide whether a daily maintenance rate in a CBA is binding. *See Baldassaro v. United States*, 64 F.3d 206 (5th Cir. 1995), *cert. denied*, 517 U.S. 1207 (1996). In *Baldassaro*, the Fifth Circuit expressly recognized conflict with the Third Circuit's decision in *Barnes*. *See* 64 F.3d at 212-13. Nevertheless, this Court declined to review the Fifth Circuit's enforcement of the CBA rate. *See* 517 U.S. 1207.[4]

Although Kirby does not presume to attach a definite meaning to this Court's previous denials of petitions like Frederick's, it is at least possible that this Court believed that whatever conflict exists on this issue is either fact driven or does not warrant this Court's interference. *Cf.* Sup. Ct. R. 10 (referring to "important" issues). Kirby certainly does not mean to belittle the overall importance of the right to maintenance. However, as explained above, there is no dispute as to whether a CBA may abrogate that important right; the courts of appeal agree that it cannot. In light of this recognition, this Court could easily conclude that the application of that rule – that is, determining whether a given rate crosses the line from negotiation to abrogation, is best left to the courts of appeal. *Cf. id.* ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings of the misapplication of a properly stated

---

[4] This Court also denied a petition for certiorari prior to the Third Circuit's decision in *Barnes*. *See Gardiner v. Sea-Land Serv., Inc.*, 786 F.2d 943 (9th Cir.), *cert. denied*, 479 U.S. 924 (1986).

rule of law.") Certainly, such a result would respect the regional variations in maintenance costs.

Even if this Court concludes that it should eventually determine at what point a maintenance rate established by a CBA becomes an abrogation of the right to maintenance, this case is a poor vehicle for that determination. The CBA rate in this case is $15. *See Frederick*, 205 F.3d at 1292. Although Frederick repeatedly refers to such a rate as "de minimis," the rates at issue in all the previous circuit court opinions have been significantly lower – almost always $8. *See Baldassaro*, 64 F.3d at 212; *Al-Zawkari*, 871 F.2d at 588; *Gardiner*, 786 F.2d at 948; *see also Barnes*, 900 F.2d at 635 (noting that most CBAs incorporate an $8 rate).[5] Even the Third Circuit recognized that bargaining towards a "realistic" rate is not prohibited. *See Barnes*, 900 F.2d at 640. Indeed, even before a significant downward adjustment, the "realistic" rate in *Barnes* was "between $15 and $16 a day." *Id.* at 641. Had the Third Circuit been faced with the bargained-for rate of $15 at issue in this case, the court might easily have accepted the rate. In other words, even if there is a conflict as to whether an $8-10 CBA maintenance rate is binding, no circuit has held that a $15 rate is unenforceable.

---

[5] Even the exception to this otherwise uniform list, *Macedo*, dealt with a rate that was a mere two-thirds ($10) of the rate at issue in this case. *See* 868 F.2d at 522.

C. ANY POTENTIAL EXCEPTION FOR SHIPOWNERS WHO VIOLATE THE TERMS OF A COLLECTIVE BARGAINING AGREEMENT HAS NO APPLICATION TO THIS CASE.

Frederick next suggests that shipowners who violate the terms of a CBA should not be entitled to rely on the maximum daily maintenance rate. (Pet., at 23-24) This does not appear to present a separate question for review. Rather, Frederick's suggestion would simply be an argument on the merits if this Court grants Frederick's petition as to the second question presented.

In any event, no court has actually adopted Frederick's proposed exception. Thus, Frederick does not even attempt to allege that the Eleventh Circuit's decision, *see Frederick*, 205 F.3d at 1292, conflicts with any decision from any other circuit court, by not creating such an exception on this point.

Perhaps more importantly, Frederick's suggested exception had no bearing on the Eleventh Circuit's decision. The Eleventh Circuit declined to create the exception proffered by Frederick because it concluded that "Kirby acted equitably" in attempting to comply with the terms of the CBA. *Id.* Likewise, as the Eleventh Circuit pointed out, the jury found that Kirby did not act willfully or arbitrarily. *See id.*

Thus, the jury and the Eleventh Circuit simply disagreed with Frederick's characterization of Kirby's actions. In other words, even if Frederick is *legally* correct that shipowners who flout the requirements of the CBA should not be allowed to invoke the CBA's maximum

daily maintenance rate,[6] Frederick is, *as a matter of fact*, incorrect that such an exception would apply to Kirby in this case. This Court rarely grants certiorari to review alleged factual errors. *See* Sup. Ct. R. 10.

D. THE ELEVENTH CIRCUIT WAS NOT ASKED TO DETERMINE THE PROPER STANDARD FOR AN AWARD OF CONSEQUENTIAL DAMAGES FOR FAILURE TO PAY MAINTENANCE AND CURE.

Finally, Frederick asks this Court, "What is the correct legal standard for awarding consequential damages following the shipowner's denial of M & C?" (Pet., at 25) In this case, that question can have nothing more than an abstract answer. This Court reviews concrete decisions; it does not answer abstract questions.

Frederick's question is an abstraction in this case because the Eleventh Circuit did not expressly decide whether the jury was properly instructed on the availability of consequential damages for failure to pay maintenance and cure. The Eleventh Circuit did not address this issue for the simple reason that it was not asked or required to do so.

---

[6] At the risk of delving too far into the merits of Frederick's argument, a CBA deals with much more than the maximum daily maintenance rate. In the overall scheme of the CBA, failure to make maintenance payments on a weekly basis and failure to pay wages for partial days worked may be relatively minor. That is, failure to comply with such provisions does not mean that a seaman is deprived of the entire "quid pro quo" of the CBA. *See Frederick*, 205 F.3d at 1291-92.

The jury was instructed that they could only award consequential damages stemming from a failure to pay maintenance and cure if they found that Kirby acted "willfully and arbitrarily" in withholding such payments:

> Therefore, in order to award additional damages to the Plaintiff for a willful failure to [sic] the shipowner to provide maintenance and cure, you must find:
>
> First: That the Plaintiff was entitled to maintenance and cure;
>
> Second: That is [sic] was not provided.
>
> Third: That Defendant **willfully and arbitrarily** failed to provide cure up to the time that the seaman reached maximum cure; and
>
> Fourth: That such failure resulted in injury to the Plaintiff.

(Petitioner's App. C, at 34a-35a) (emphasis added) Frederick did not object to the above instruction at the trial level, therefore the legal standard applied by the district court was not an issue for the Eleventh Circuit nor is it an issue for this Court. As the Eleventh Circuit recognized, and as Frederick admits, the jury found that Kirby did not act willfully and arbitrarily. In the absence of any evidence of jury confusion, a jury is presumed to have followed the court's instructions. *See, e.g., Weeks v. Angelone*, 120 S. Ct. 727 (2000); *Richardson v. Marsh*, 481 U.S. 200 (1987). Frederick offered no evidence of jury confusion.[7] In the same vein, the district court noted that

---

[7] Frederick's assertion that the district court determined that the jury had, in fact, used a "reasonable person" standard,

the jury "diligently followed the instructions of the court." (Petitioner's App. B, at 30a)

Thus, the jury did not award Frederick any consequential damages for the failure to pay maintenance and cure. Had Frederick wished to challenge the award on these grounds, he could have easily moved for a new trial in the district court and, if necessary, raised the issue on cross-appeal in the Eleventh Circuit. Frederick did neither.

In short, the Eleventh Circuit assumed, but was not asked to decide, the correct standard for an award of consequential damages. As a result, there is simply no decision for this Court to review.

---

and that their award had included consequential damages for failure to pay maintenance and cure, is completely unsupported by the district court's order. As mentioned above, the district court noted that the jury "diligently followed" its instructions. (Petitioner's App. B)

CONCLUSION

For the foregoing reasons, Respondent, Kirby Tankships, Inc., asks that this Court deny the petition for writ of certiorari.

Respectfully submitted,

ALLEN VON SPIEGELFELD, ESQUIRE
Counsel of Record

and

CHARLES TYLER CONE, ESQUIRE
FOWLER, WHITE, GILLEN, BOGGS,
VILLAREAL AND BANKER, P.A.
Post Office Box 1438
Tampa, Florida 33601
(813) 228-7411

Counsel for Respondent,
Kirby Tankships, Inc.